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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
)  
)

Preemption of State and Local )  
Zoning and Land Use Restrictions )  
On the Siting, Placement and )  
Construction of Broadcast )  
Station Transmission Facilities )

MM Docket No. 97-182

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF THE CITY OF PHILADELPHIA**

**Summary**

It is the position of the City of Philadelphia (the "City") that for the reasons set forth below, the Commission must not adopt the proposed rules purporting to preempt local authority over the placement, construction and modification of broadcast transmission facilities. The rules are misguided and will cause unnecessary harm to individuals and communities across the country, without materially advancing the Commission's policy goals.

Our principal objection to the proposed rules is that they do not fairly balance federal and local interests. The rules are ostensibly proposed to advance a Commission policy of rapid deployment of digital television ("DTV"). The Commission has directed broadcasters to complete the roll-out of DTV by 1996, but broadcasters in the top ten market areas, including Philadelphia, must complete the process by May 1, 1998. Although the National Association of Broadcasters and other parties had ample opportunity to object to the proposed schedule, none introduced the issue of local zoning until after the Commission announced its schedule. Now the Commission proposes to preempt local zoning requirements to meet its schedule. This failure to

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consider in the original rulemaking what is now claimed to be such a critical factor --  
preemption of zoning laws -- is arbitrary and capricious.

The City's zoning process considers the interests of all parties affected by a decision, and the well-being of the City as a whole. The proposed rules would tear a gaping hole in that process, leaving residents unprotected from the threat of physical injury and loss of property value, and giving a single industry a unique and unfair advantage over other property owners. The City must retain control of its own zoning process to preserve its economic vitality.

The City particularly objects to the deadlines the proposed rules would superimpose on the City's procedures. They are unreasonable and impossible to meet, and if adopted would subject the City to claims that its zoning laws violate the equal protection and due process rights of property owners in the City. If the Commission must address the matter at all, it should do so in the same fashion as Section 332(c)(7) of the Communications Act (the "Act"), which permits local governments to act within a "reasonable" time.

Preemption is unnecessary because local zoning laws are not the only requirements that might affect deployment of DTV. There is ample evidence that the Commission's schedule will be difficult if not impossible to meet, not because of local zoning laws, but because of many other factors including site identification, Federal Aviation Administration review, completion of engineering studies, and other factors.

In addition, the Commission has no authority to preempt local zoning of antenna towers. The only reference to towers in the Communications Act is in Section 303(q), which permits the Commission to regulate the lighting and marking of towers. There is no express statement authorizing the preemption of local zoning codes. Indeed, Commission policy has been to avoid such matters, and Congressional policy under the Act is to respect the prerogatives of state and

local governments. Finally, in the Telecommunications Act of 1996, Congress specifically gave the Commission authority to regulate zoning of over-the-air receiving devices, and restricted local regulation of personal wireless facilities zoning in a manner that indicated that Congress did not believe the Commission had inherent authority to regulate those areas. Thus, the Commission has no power to adopt the proposed rules.

The Commission's proposed preemption of local zoning laws will have the effect of a taking of private property without just compensation, in clear violation of the Fifth Amendment. The construction of towers will inevitably affect the aesthetic qualities of neighborhoods surrounding the towers. Local zoning laws are designed to protect property values and balance multiple interests in service of both the Fifth Amendment and other policy concerns. The proposed preemption would ignore all of those concerns in favor of a single interest. By dramatically altering aesthetic values, the proposed rules would "take" one element of the bundle of rights that constitutes property ownership. The resulting loss in the value of the property is a taking without compensation.

The proposed rules would also effect a taking because there is no meaningful relation between the proposed rules and the federal policy interests they allegedly advance. Because the Commission's deployment schedule will not be met anyway, and because there are so many other factors that will affect deployment that the Commission has not proposed to address, the rule is ultimately irrational. Furthermore, Supreme Court precedent requires that there be an "individualized determination" that the burden imposed on the property owner is appropriate in light of the government's purpose. The Commission's blanket preemption fails this test.

The proposed preemption would also violate the Tenth Amendment, because it would commandeer local government processes to enforce federal policy. Instead of regulating the

placement of broadcast towers itself, the Commission would force the City to approve siting requests within an unreasonably short time or have them deemed approved. The Commission has no authority to “deem” that a local government has acted. Similarly, by essentially allowing tower siting anywhere in the City, the proposed rules have effectively amended the City’s entire zoning code. Any rational policy decisions the City may have made in setting up its land use plan and zoning policies would become irrelevant. This, too, violates the Tenth Amendment.

The Commission should also consider that under state law, the proposed rules could be found to permit construction of a nuisance, which would entitle adjacent property owners to damages from tower owners.

Finally, the Commission should not preempt local authority to consider the effects of radio frequency emissions in siting decisions. The Commission has no authority to act in that area whatsoever, as indicated by the Congress’s decision to give the Commission specific authority over such emissions from personal wireless facilities. In addition, the Commission should avoid further regulation in the area because its own procedures are ineffective.

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**COMMENTS OF THE CITY OF PHILADELPHIA**

**Introduction**

The rules put forth in the Notice of Proposed Rulemaking released August 19, 1997 (the "NPRM"), that would preempt local authority over the placement, construction and modification of broadcast transmission facilities, are unreasonable, unnecessary and unlawful. The Commission must not adopt them. The City of Philadelphia (the "City") believes that upon careful consideration the Commission will recognize that it has no role to play in local zoning, and that the City and other local jurisdictions are not standing in the way of federal objectives. The Commission lacks the authority to preempt our zoning laws, and any preemption is likely to raise issues under the Tenth Amendment to the Constitution, as well as the Fifth Amendment and the corresponding provisions of state constitutions. In short, the Commission should close this proceeding without further action.

I. THE PROPOSED RULES ARE IMPRACTICAL, ARE BASED ON A SIMPLISTIC VIEW OF THE ZONING PROCESS, AND DO NOT FAIRLY BALANCE FEDERAL AND LOCAL INTERESTS.

The Commission's role is to establish overall telecommunications policy, within the confines of its statutory authority. The NPRM acknowledges the role of local governments in zoning and land use matters, and the Commission's historical efforts to avoid becoming involved in local zoning matters. NPRM at ¶¶ 11, 15. The proposed rules, however, do not consider the needs of individual communities.

A. The Proposed Rules Demonstrate a Lack of Understanding of the Purpose and Operation of Zoning Laws.

The proposed rules fail to take into account most of the purposes behind zoning laws, or how those laws typically operate. Zoning laws are designed to balance multiple interests in a scheme in which all property owners surrender some of their authority in return for a measure of protection by the law. At the same time, the City benefits because the zoning laws benefit all the residents of the City as a class and therefore the City itself. The proposed rules, however, would benefit a single class of property owners to the exclusion of all others. They would also essentially require that any mechanism that does not give the members of that class exactly what they want be invalidated.

1. Current zoning procedures in the City of Philadelphia are designed to consider the interests of all parties affected by a zoning decision, and the well-being of the City as a whole.

The proposed preemption of all local laws and rules that might "impair" the placement of broadcast transmission antennas is enormously troublesome.<sup>1</sup> The towers in question are

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<sup>1</sup> These comments primarily address issues arising out of the proposed preemption of zoning laws governing the placement of towers, but the actual text of the proposed rule is much broader. First, the proposed definition of "broadcast transmission facilities" (Section (f)(i))

typically the largest tower structures – indeed, the tallest structures of any kind – in a metropolitan environment. In a city with largely flat, close-to-sea-level terrain like Philadelphia, a 1000 – 1200 foot tower is simply enormous. Structures this large have a greater effect on the property values of residences and business and the aesthetic qualities of the urban environment than any other towers, or even any other structures. The effects of such towers if placed in residential areas would be particularly dramatic and harmful.

Thus, the proposed rules would entirely deprive the City of Philadelphia of the ability to regulate those structures that, of all the communications facilities expected to proliferate as a result of the Telecommunications Act of 1996, have the greatest potential for negative effects on the City and its residents. Inappropriate siting of a single broadcast tower could have lasting deleterious effects on the City and its residents, yet the NPRM would eliminate local control

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includes "associated buildings" as well as towers. Second, Section (b)(2) would preempt any "building" regulation that "impairs the ability of ... operators to place, construct, or modify broadcast transmission facilities." The two together are so broad as to threaten the City's ability to regulate structural integrity, code compliance, and other public safety matters as they pertain to the buildings, towers and antennas included in "broadcast transmission facilities," given that regulation of such "code" matters is bound to "impair" the operators' ability to place and construct such facilities. In fact, impairing the ability to construct unsafe structures is the point of building codes.

Absent express deference to local building codes and other public-safety oriented regulations, including deference to the time frames required to review plans, inspect, and enforce, the palliative offered in (b)(2)(i) is inadequate. And in any event, the ultimate effect of the proposal is that the Commission, not the civil engineers and experienced regulators responsible for City code compliance, will determine whether a structure is "safe." As noted below, the Commission does not now conduct meaningful evaluations of compliance with its own radio frequency emissions standards; it seems unlikely that the Commission is capable of protecting the health and safety of residents of every community in the country.

The Commission should not ignore the role of local governments in safety matters. On October 23, 1997, three people were killed when an 1,800 foot television tower collapsed in Mississippi. "TV Tower Crash Kills 3 Canucks," The Toronto Sun, October 24, 1997, Final Edition, p. 42. The collapse knocked out the transmissions of two television stations, a radio station, and communications for several government agencies. In falling, the tower pulled down live electric power lines, hampering the arrival of emergency crews. The Commission does not now police this kind of situation, nor is it prepared to.

over the placement of towers. There is no role for the Commission in local zoning and the Commission must not attempt to impose its will.

2. The siting of antenna towers affects not only health and safety issues, but aesthetics, economics and other interests as well.

The proposed rules would allow the City to regulate the placement and construction of antennas if the City could show its ordinances were intended to meet a "health or safety objective." Under traditional principles of local government law, however, the phrase "health or safety objective" in the proposed rule could be cause for confusion, and because the Commission is not an expert land use or zoning agency we believe some clarification may be in order.

Generally speaking, when a local government acts, it does so by exercising its police power. The police power can be roughly defined as the power to protect the public health, safety, and general welfare. Local government may exercise its police power to protect health and safety in particular, but it may also exercise its police power for other specific objectives that come under the general rubric of health, safety and general welfare. When a local government enacts zoning laws, for example, it is not acting to protect health and safety directly, in the way that a building or fire safety code does. Instead, it is acting to promote the health, safety, and general welfare by: (i) maintaining property values; (ii) stabilizing areas; (iii) limiting population density; (iv) preserving aesthetics; (v) controlling architecture; and (vi) preserving historic districts. Reynolds, Handbook of Local Government Law § 118 (West 1982).

Therefore, references to "health and safety" may, depending on the context, be intended to include the full scope of the police power, or only the narrower, direct sense of "health" and "safety." The proposed rules and the NPRM, however, ignore this relationship among the

police power, health and safety, and zoning laws. The proposed rules permit local codes to address "health or safety objective[s]," but do not specify whether the reference is to the broad, police power sense of the phrase, or the narrow, specific sense. We presume that the reference to health and safety in the proposed rules was meant as a general reference to the police power – if it was intended as a specific reference to health and safety narrowly, the provision could be taken to ban nearly all zoning laws, since the six purposes of zoning laws cited above do not expressly include health or safety. As we have noted, aesthetic, economic and other issues are central elements of zoning laws. Still, even if our presumption is correct, the rule is subject to misinterpretation and abuse because of this lack of care in the use of terms of art.

3. Where the City has identified particular zones in which antenna towers may be sited as of right, broadcasters should not be entitled to an expedited process or any other special treatment.

The Philadelphia Zoning and Planning Code provides that radio and television broadcast towers are permitted uses in "G-1" and "G-2" General Industrial Districts and "LR" Least Restricted Industrial Districts. The Philadelphia Code, §§ 14-507 - 14-509; Declaration of Debora Russo in Support of the Comments of the City of Philadelphia ("Russo Declaration"), attached as Appendix A, ¶¶ 7-9. This means zoning permits and use registration permits -- the two types of zoning permits required for any new land use under the Code -- are granted effectively as of right: The City will make no objection to the use of land in these districts for the erection of radio and television broadcast towers. Russo Declaration, ¶ 7. For such permitted uses, zoning permits typically will be granted in two to three weeks. An accelerated review procedure is available for the payment of a \$200 fee, under which a permit can be obtained in as little as three to five days. Modifications of existing towers located in these industrial districts, including the addition of antennas or other equipment, is not subject even to

the zoning permit requirement, as long as the changes or additions do not result in a non-permitted use. *Id.* The zoning code imposes no height restrictions in these districts.

Thus if a broadcaster wishes to build a twelve-hundred foot or higher radio or television broadcast tower in one of these districts, the zoning code will present no obstacle. Moreover, there is no shortage of G-1 and G-2 properties in the City. Russo Declaration, ¶ 7.

Broadcasters faced with short construction deadlines can take advantage of these zoning districts and avoid any delay related to the City's zoning process.<sup>2</sup> Under these circumstances, there is no compelling reason for treating broadcasters any differently from others -- and certainly no compelling reason for overriding the City's authority to regulate land use.

Such a policy is a rational approach to balancing the interests of local communities and of broadcasters, but the proposed rule makes no allowances for it or similar schemes. The proposed rules essentially provide that broadcasters can site their towers anywhere they want, no matter what steps the locality has taken to balance the many interests involved.

4. The proposed rules fail to consider that denial of a particular siting request is not an absolute denial, and that a community might permit siting in an alternate location.

The proposed rules consider only the interests of the broadcaster. If the broadcaster chooses a site and the City refuses to accept that site or approve that site, the proposed rules presume that it is the City that must yield. This presumption is wholly unreasonable. The City's refusal to agree to placing a tower at one site does not mean it will refuse to allow a tower anywhere. Zoning is ultimately a cooperative process that attempts to find a compromise acceptable to all. The proposed rules, however, allow no room for compromise.

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<sup>2</sup> And if the broadcaster determines it is more cost effective or otherwise desirable to build in a more restrictive zoning district, then it has the option of requesting a special use permit or variance through the established procedures.

5. The City should be allowed to impose conditions on tower siting to protect property values, the integrity of neighborhoods, and the long-term vitality of the City as a whole.

As discussed above, one purpose of zoning laws is the preservation of property values and the stability of areas within a community. This is extremely important in Philadelphia. Like many large, older cities, Philadelphia benefits from having many heterogeneous, discrete neighborhoods. These neighborhoods define the character of the City in ways that non-residents may not fully appreciate, but are an integral part of what makes the City an attractive place to live. It is vital to the survival of the City that middle class residents stay in the City. Anything that threatens the economic investment or quality of life of middle class residents threatens the overall health of the City.

Therefore, the location of antenna towers is a critical zoning issue. If broadcasters have the right to place towers based purely on what is best for them, the needs of the City as a whole will be forgotten. The City must retain the discretion to address the full range of factors, including not just the economic interest of broadcasters, but the health of the entire City, in its calculations. The proposed rules do not consider the larger interest.

Nor do the proposed rules appear to allow the City to impose reasonable conditions on the grant of a request. Thus, even if the City acted within the required time frames and justified its zoning law on health or safety grounds, it is not clear that the proposed rules would allow the City to do anything other than simply grant the request.

For example, prior to grant of zoning approval or a construction permit, broadcasters should be required to certify that they will take all steps necessary to complete the tower and associated facilities, and begin providing the intended service. In addition, failure to comply with the conditions should be grounds for ordering the dismantling of the tower. The ostensible

purpose of the rules is to allow broadcasters to meet the Commission's accelerated deployment deadlines for DTV. If the City is prepared to grant a request, the broadcaster must be prepared to provide the service. Otherwise, the community will have consented to the installation of an eyesore ostensibly in furtherance of federal goals, but actually for no good reason.

**B. If the Commission Insists on Usurping the City's Traditional Authority to Enforce Health and Safety Codes, Then It Must Require the Broadcasters to Indemnify Our Citizens Against Damages Caused By Unsafe Towers.**

The Commission proposes, in effect, to enter the field of local land use regulation by displacing the City's authority to regulate not only tower siting, but, it appears, even the health and safety aspect of broadcast towers. The proposed rule would preempt "[a]ny state or local land-use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities ...". NPRM, Appendix A at 38. On its face, this includes building, fire, and electrical code regulation, and expressly puts the operators' ability to place, construct, and modify these one and two thousand foot towers ahead of the City's traditional power to protect public safety.<sup>3</sup>

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<sup>3</sup> The proposed rule goes on to suggest that the City may be able to retain regulatory authority where it can "demonstrate" that its traditional public safety code regulations are "reasonable in relation to: (1) a clearly defined and expressly stated health or safety objective ...". It is anyone's guess whether the petitioners or the Commission intends this clause to cover building, fire, and electrical codes. We do not know what constitutes a "clearly defined and expressly stated" health and safety objective. And even if we succeed in demonstrating one, the health and safety of our citizens still is to be balanced - by the Commission, it appears -- against the alleged "federal interests" in allowing tower construction to go forward, safe or not. This is backwards. The burden should not be on the City to demonstrate the reasonableness of ensuring public health and safety -- that is a traditional role of municipal government -- or to prove that public health and safety are as important as building broadcast towers. At a minimum, it appears the rule would require Philadelphia and every other city to reexamine, justify, and readopt every relevant code provision to ensure that it contains a "clearly defined and expressly stated" health or safety objective, and still be prepared to have its judgment overruled by the Commission. This is an inappropriate and unacceptable burden on a traditional function of local government.

The City objects strongly to any such limitation on its traditional powers, and responsibility, to ensure the public health and safety by code regulation. This is a fundamental function of local government, which the Commission is ill-suited to carry out. The proposed preemption literally would prohibit the City from ensuring that twelve-hundred foot structures erected in densely populated urban neighborhoods conform to safe engineering and construction practices. Assurances of the broadcasters notwithstanding, a hundred years of building code regulation have taught the major cities that market-oriented private enterprises cannot be counted on to adhere voluntarily to sound or safe practice. (See, e.g., the tower collapse reported in note 1 above.) If, however, the Commission insists on usurping our regulatory authority in this area, then at a minimum it should expressly require broadcasters and tower owners to indemnify the City and individual citizens for any and all damages to person, property, and property values, that are suffered as a result of the erection, presence, and/or failure of a broadcast tower. This, at least, would have the salutary effect of forcing operators to balance the economic benefit of placing a tower in a particular location against the potential costs to the City and neighborhood residents.

C. The City Supports the Return of Spectrum for Public Safety and Other Uses, But the Proposed Deadlines Are Simply Unrealistically Short.

The City has an interest in the rapid deployment of DTV, because of the possibility that the prompt return of frequencies would allow the Commission to reallocate those frequencies for public safety and other uses of value to the City.<sup>4</sup> However, the cost of depriving the City of its ability to impose reasonable regulation on tower structures and tower siting outweighs this

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<sup>4</sup> The City notes, however, that the Commission has not actually committed itself to allocating any of the spectrum for that purpose.

possible benefit. The interests of the City would be far better served, however, by a DTV roll-out schedule that allows reasonable zoning and code regulation.

In any case, the proposed deadlines for action on siting requests are impossible to meet without discarding all notice and time-for-appeal provisions of the Philadelphia Zoning and Planning Code. It should be noted that such provisions are not calculated to cause unreasonable delay: The time for an aggrieved citizen to appeal a decision on a zoning matter to the Zoning Board of Appeals is thirty days. This time frame is set by local and state rules of procedure, which would have to go through a lengthy amendment process in order to meet the Commission's proposed time lines. Notice of the appeal must be posted on the affected property for at least twelve consecutive days prior to the hearing date (which is specified in the petition upon acceptance of the appeal), and public notice of hearings must be published prior to the hearing. The appeal period plus the notice period thus total only forty-two days. Even these short periods are inconsistent with the proposed rule, which would allow only twenty-one days for review and decision on modifications, only thirty days where towers are relocated within 300 feet or facilities are consolidated on a single tower, and no more than 45 days for all other applications, including new tower construction -- after which periods the application is "deemed approved" if not acted upon. Thus the rule would limit the entire period for City consideration of a zoning application to a period that is substantially less than or about the same as the time for appeal alone. This effectively abolishes the right of appeal for zoning decisions, and with it, a fundamental City mechanism for protecting the rights of individual property owners who are harmed by land use decisions.<sup>5</sup>

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<sup>5</sup> It is essential to note that the proposed rule does not provide for appeal rights or appeal procedures, except to the Commission where a decision is adverse to the broadcaster applicant. Under the proposed regime, our citizens would have no recourse where an

As the foregoing discussion shows, the time frames in the proposed rules would force the City to violate notice and hearing requirements that have been incorporated into its zoning laws to ensure the protection of residents and their property rights. The proposal that applications be deemed granted if the deadlines are not met would preclude Philadelphia citizens from protecting their legitimate interests through the zoning process, and would expose the City to claims that it has violated citizens' due process and equal protection rights. The Commission would in effect be forcing the City to violate the constitutional and statutory rights of its citizens and to bear the cost of the resulting litigation.

The Commission would do well to be guided by the wisdom of Congress in this regard. When Congress added Section 332(c)(7)(B)(ii) to the Act, establishing standards for local governments to follow in reviewing siting requests for personal wireless facilities, it specifically stated that action should be taken in a "reasonable" time. NPRM at n. 6. As the NPRM notes, *Id.* at nn. 7, 8, the proposed rules are modeled in many respects on Section 332(c)(7), but in this and in other key areas were revised in ways that favor broadcasters and tower operators.

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application is "deemed approved" -- unless, of course, they elect to litigate with major corporations before the Commission in Washington, D.C., a course of action that is hardly available to the average Philadelphia property owner.

And this does not even address the time periods required for review of building permit applications. Building permit review in the City normally takes three weeks, and if all required information is submitted and satisfactory, a permit will be issued in that period of time. If the applicant's submission is insufficient and additional information is required, or safety issues are raised by the proposed plans, then of course the time necessary to obtain the permit will be longer. The short time frames provided in the proposed rule do not allow for legitimate investigations, including requests for additional information, that the City may require in order to ensure that a structure is safe. (The rule itself imposes the need for such investigations, by requiring that all decisions be based on "substantial evidence." NPRM, App. B at 38-39). Thus, where the City takes the time required to exercise its statutory responsibility of protecting the public health and safety, the result will be a "deemed approved" application. Clearly this is the result intended by the rule. As a practical matter, the rule would eliminate, not expedite, the City's permitting and code enforcement procedures.

Although we oppose preemption entirely, the proposed deadlines are particularly troublesome, because they show a complete lack of understanding of and respect for local processes.<sup>6</sup> At the very least, if the Commission is to be guided by the example of Section 332(c)(7), it should not deviate from the model.

D.           The Pressure on Broadcasters To Obtain Site Approvals Is Entirely the Result of Arbitrary Commission Action and Cities Should Not Be Punished Because the Commission Has Established an Unreasonable Construction Schedule.

According to the NPRM and the NAB Petition, local zoning rules must be preempted because they will prevent the deployment of DTV in accordance with the schedule announced by the Commission in its *Fifth Report and Order* in MM Docket No. 87-268, FCC 97-116 (April 22, 1997). This schedule was set by the Commission after first being vigorously opposed by the NAB and other representatives of the broadcasting industry. NAB Docket 97-182 Comments at 6-8 (filed Nov. 20, 1995). The schedule does not represent the will of Congress. Indeed, as we will discuss further below, the Commission's references to statutory authority for rapid deployment are completely unfounded.

In addition, as far as we can tell, the record leading up to the *Fifth Report and Order* does not take local zoning rules and local decision-making time frames into account. The first

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<sup>6</sup> As an aside, the Commission's rulemaking process in this docket will take nearly a year. The NAB's Petition for Further Notice of Proposed Rulemaking (the "NAB Petition") was filed on May 30, 1997. The NPRM was released 81 days later, on August 19, 1997. The comment period does not close until December 1, six months after filing of the NAB Petition. Based on precedent, it will take the Commission several months to consider the comments and then issue its decision. Thus, it could easily be a year from the initiation of this proceeding until the effective date of any final rules. Just as the Commission must take the appropriate amount of time to consider an important public policy matter, and the City is also engaged in important public policy matters, and our citizens are entitled to the same opportunity for comment and debate on the issues. Therefore, simply as a matter of comity, the Commission should refrain from preempting any local deadlines for action.

time this issue was raised was in the NAB Petition. Therefore, it would be unreasonable for the Commission to now declare that local zoning and building codes frustrate federal policy, when the Commission did not consider the issue in setting the policy. Furthermore, if local zoning laws were such an obstacle that they must be preempted, we find it hard to believe that none of the Commission, the NAB, or any other interested party mentioned the problem when the schedule was being developed. While the City and other communities did not participate in that proceeding, the Commission has considered the effects of local zoning laws on its policies in the past and did not need to be told that the issue might be a factor.

E. Preemption Is Unnecessary Because the Industry Will Be Unable To Comply with the Commission's Schedule, Regardless of Local Zoning Constraints.

The NAB supports its claim that local zoning rules must be preempted by citing an article in the New York Times. NAB Petition at 7. While this article does refer to local zoning issues, it actually makes a much broader and more telling argument. J. Brinkley, *Crews are Scarce for TV's High Danger Task*, *N.Y. Times*, May 4, 1997, at 1. The article explains that there are so many different obstacles facing broadcasters that the schedule simply cannot be met. *Id.* See also F. Dawson, *Can Cable Profit From Tall Tower Shortage?*, *Multichannel News*, October 20, 1997, at 1. The New York Times article states that because of the shortage of trained crews, no more than 20 towers can be built in a year. Theoretically, the top ten markets could need as many as 40 towers built by the initial deadline of May 1, 1999. Even if only half or a third of that number actually need to be built, it will obviously be a daunting task.

Another considerable obstacle is obtaining Federal Aviation Administration approval for the tower. A determination by the FAA that construction of a tower will not pose a hazard to air navigation is, as a matter of practice, a condition for grant of a construction permit by the Commission. We also understand that FAA review typically takes substantially longer than

most zoning processes. *See City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979) (FAA review of radio tower took over 16 months). Thus, imposing the time frames proposed by the NPRM on the City's regulatory review process will not result in the towers being erected within the Commission's deadline, given the time normally required for FAA review. A sensible rule would require the operators to get FAA and Commission approvals before filing zoning applications. At a minimum, the Commission should be required to determine and take account of normal FAA and other federal (including Commission) approval times as part of its fact finding in this proceeding.

Among the other obstacles broadcasters face are finding a suitable site; complying with all the requirements for a Commission construction permit; performing all of the engineering studies and work needed to design both a tower and an antenna; and obtaining sufficient specialty steel to construct the tower. None of these tasks is simple. Although many can be performed simultaneously, a significant delay in any one of them can throw the whole schedule off.

According to the NAB Petition itself, it could take over a year to get a single tower in place; six months are needed to order the steel, another six months to put up the tower, and one month to install cabling and equipment on the tower. NAB Petition, Exhibit B. This does not even include the time needed for FAA approval, discussed above. For just three companies to put up twenty towers in that period of time will not be possible, because it will not be possible to synchronize all the steps. The stumbling block will be actual construction, because it is the last stage in the process, and the most inflexible: a crew, no matter how well-trained, can only build one tower at a time.

In other words, even with the proposed preemption, there is no guarantee that the Commission's goals will be met.

In addition, the broadcast industry itself has done little to address the problem. To date, no formal siting request has been submitted to the City of Philadelphia. We understand that only one jurisdiction in the top ten market areas has received such a request, even though the NAB Petition was filed five months ago and the *Fifth Report and Order* released six months ago.<sup>7</sup> This is hardly a sign that the broadcast industry fears its own imminent demise.

In fact, there is no requirement in the Commission's rules that broadcasters begin their DTV transmissions from permanent facilities. We suspect that in many cases, broadcasters will install temporary antennas just so they can meet the letter of the rules. Since there will be very few DTV sets in service by May of 1998, use of such temporary facilities will have little effect on consumers. Therefore, the alleged benefits that supposedly justify preemption are at best doubtful.

## II. THE COMMISSION HAS NO AUTHORITY TO PREEMPT LOCAL ZONING LAWS GOVERNING THE PLACEMENT OF ANTENNA TOWERS.

The Commission cannot lawfully adopt the proposed rules, notwithstanding the analysis of the Commission's authority in the NPRM. See NPRM at ¶¶ 12-15. The Commission's authority over broadcast transmission towers is limited to that granted in Section 303(q) of the Communications Act of 1934 (the "Communications Act" or the "Act"), and that authority does not extend to the preemption of local zoning laws.

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<sup>7</sup> The Initial Regulatory Flexibility Analysis accompanying the NPRM states that the Commission believes compliance with local requirements may hinder DTV deployment. We believe there is no credible evidence that this is a significant problem.

A. The Commission Has No Express Authority to Preempt Local Zoning Power Over the Siting of Antenna Towers.

The first source to be examined in determining the scope of the Commission's authority is always the express language of the Communications Act. The NPRM ignores this point, thereby implicitly acknowledging that the Commission has no express authority to preempt local zoning laws governing the siting of broadcast transmission facilities. The Act does not authorize the Commission to preempt local zoning laws or to address issues related to the siting of broadcast transmission antennas. The Act is silent on the subject of local zoning, and its only reference to broadcast towers in Section 393(q) refers merely to their painting and illumination. Thus, the Commission has no express authority in this area.

B. The Commission Has No Implied Authority to Preempt Local Zoning Power Over the Siting of Antenna Towers.

The Commission has implied authority to preempt state or local law, only if preemption is necessary to accomplish Congressional objectives. "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Those objectives can only be determined by referring to the language of the Communications Act.<sup>8</sup> The NPRM argues that preemption is necessary to meet an ostensible goal of speedy recovery of spectrum, but that goal is purely a creature of the Commission, without any statutory underpinning.

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<sup>8</sup> The NPRM cites *City of New York v. FCC*, 486 U.S. 57, 63 (1988), for the proposition that the Commission may preempt state or local law if preemption is necessary to achieve the Commission's purposes "within the scope of our delegated authority." NPRM at n. 19. This is not a separate ground for preemption, however, because the Commission's purposes are limited by the Congressional purpose expressed in the statute. The Commission is always limited by the intent of Congress and never free to embark on frolics of its own.

1. The Commission Only Has Implied Authority if Congress Intended Federal Regulation to Supersede State or Local Law.

There is nothing the Communications Act or its legislative history to indicate that Congress ever intended the Commission to preempt local zoning authority over the siting of broadcast transmission facilities.<sup>9</sup> The Commission has never claimed to have such authority in the past, and the NPRM itself notes that “historically we have sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement.” NPRM at ¶ 15.

Congress has specifically identified those limited circumstances in which the Commission is authorized to preempt local zoning laws. These circumstances do not include broadcast towers.<sup>10</sup> The Telecommunications Act of 1996 (the “1996 Act”) contained two provisions dealing directly with local zoning issues. In the first, Section 207, Congress directed

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<sup>9</sup> Furthermore, the Commission cannot act without authority. “[W]e simply cannot accept an argument that the Commission may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself.” *Louisiana Public Service Comm’n*, 476 U.S. at 374.

<sup>10</sup> The NPRM asserts that the Commission has preempted local zoning ordinances when those ordinances “were inhibiting the implementation of Congressional or Commission objectives, including with regard to satellite ‘dish’ antennas and amateur radio towers.” NPRM at ¶ 15. We note, however, that the Commission’s authority to preempt zoning rules governing the placement of large satellite dishes has never been reviewed by the courts. Numerous cases have applied the rules without contesting their validity. The one court of which we are aware that raised the issue expressly declined to rule on it. *Van Meter v. Township of Maplewood*, 696 F.Supp. 1024 (D.N.J. 1988). In addition, the Commission’s statutory authority for the preemption was weak.

Furthermore, the alleged preemption of zoning rules affecting the placement of amateur radio antennas is quite limited. The Commission was careful not to formally preempt; instead, the rules only require that local ordinances reasonably accommodate the federal interests. This may have been because the Commission knew it was on shaky ground. Indeed, the Commission’s Memorandum Opinion and Order, 58 R.R.2d 1952, cites no statutory authority whatsoever for the Commission’s action. Reviewing courts have noted that the amateur radio antenna rules are not a true preemption, but merely authority for the courts to independently review the merits of each case and weigh the local interests against the federal interests. *See, e.g., Evans v. Board of County Commissioners of Boulder County, Colorado*, 994 F.2d 775 (10<sup>th</sup> Cir. 1993); *Williams v. City of Columbia*, 906 F.2d 994 (4<sup>th</sup> Cir. 1990).

the Commission to preempt certain restrictions on the placement of satellite receiving antennas and other receiving devices. If Congress had believed that the Communications Act already conferred preemption authority, Section 207 would not have been necessary.

In the second provision, Section 704 of the 1996 Act, which became Section 332(c)(7) of the Communications Act, Congress restricted local zoning authority over the placement of personal wireless facility transmission antennas. Once again, if Congress had believed that the Commission already had the authority to preempt local zoning laws, a section expressly permitting preemption under certain circumstances would not have been necessary.

Furthermore, the Supreme Court has repeatedly warned against the casual preemption of state or local law, both by federal statutes and by administrative regulations. As the Court stated in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), “we must assume Congress does not exercise [the power to preempt] lightly.” Congress must make its intention “clear and manifest” if it intends to preempt the traditional powers of the States. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Local zoning authority is such a traditional power.

The Commission itself has acknowledged the limits of its authority. In *Illinois Citizens Committee for Broadcasting v. Sears Roebuck & Co.*, 35 FCC 2d 237 (1972), the Commission concluded that it had no jurisdiction over the construction of the Sears Tower in Chicago, even though the petitioners claimed that construction of the building would interfere with their television reception. The Seventh Circuit affirmed, holding that the Commission does not have jurisdiction over all activities which might substantially affect communications. *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7<sup>th</sup> Cir. 1972). The court also stated that “to so find ... would be to enmesh the Commission in a variety of local considerations and an often complex local regulatory scheme.” *Id.* at 1400. Finally, the court